Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MARTIN ROSENTHAL,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. If federal officials charge a federal employee with an alleged federal crime, but allegedly deny him a fair hearing before and after punishing him for the alleged federal crime, and no other hearing is available to address the criminal punishment, may the federal employee pursue a judicial remedy, in order to obtain a hearing which will afford him procedural and substantive due process?

2. If federal officials seize the property of a federal employee, allegedly fabricate reports that it is a dangerous weapon, allegedly fabricate a scenario that the employee was acting dangerously and insubordinately at the time of the seizure, allegedly knowingly punish the employee for an alleged federal crime, without justification, and permanently bar the employee from ever possessing the property, may the employee sue these federal officials for damages under the Fourth Amendment and for declaratory judgment and injunctive relief?

3. If a federal employee calls upon federal law enforcement officers to come to his aid, in order to regain possession of his legal property after it has been seized by other federal officials, and in order to help stop other federal officials from allegedly portraying the seized property as a dangerous weapon and the employee as an allegedly dangerous person, and the federal law enforcement officers instead seize the property themselves and allegedly intentionally and falsely report it as an illegal, dangerous weapon, may the employee sue those law enforcement officers for violations of the Fifth Amendment of the U.S. Constitution?

4. If federal officials and federal law enforcement officers allegedly join together in order to commit the acts set forth in Questions 1, 2, and 3, above, and allegedly make use of interstate commerce to defraud the federal employee of his property and to obtain his wrongful punishment for an alleged federal crime, may the federal employee sue those officials for violations of the Racketeer Influenced and Corrupt Organizations Act and violations of state law?

5. Was the District Court obliged to rule on a motion to permit discovery and hold a hearing on the capacity of federal officials, in light of alleged definite evidence that the federal officials fabricated accounts of the existence of a dangerous weapon and fabricated accounts of dangerous behavior by a federal employee, in order to punish him for an alleged federal crime?

6. If attorneys of the U.S. Attorney's Office allegedly received false police reports about a federal employee, resulting in the wrongful punishment of the employee for an alleged federal crime, and the employee needs to call these attorneys as witnesses against the defendant police officers and other defendant federal officials who made the alleged false reports, should the District Court have granted the motion of the employee that the U.S. Attorney's Office be ordered to withdraw from representing the police officers and other federal officials?

7. If the District Court and the Circuit Court of Appeals assumed that the seizure of property, noted in Questions 1, 2, and 3, above, was necessary, because the federal officials reasonably believed it to be unlawful, did both courts assume the well-pleaded facts of the complaint are false, and thereby violate the applicable standard of review?

8. If the District Court and the Circuit Court of Appeals construed an undefined term in a criminal statute by applying a definition which is not the ordinary, common meaning of the word, did both courts violate the applicable standards of statutory construction and review?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The following list contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit: Martin Rosenthal, the United States, the Social Security Administration, the General Services Administration, Kenneth A. Apfel, David J. Barram, Charles R. Boyer, Stephen Jon Ahlgren, Bonny Barezky, Frank McGinley, Patricia Carey, Gustav Anderson, Raymond R. McKay, Paul Maxse, Daniel Kvachkoff, Cleophas Bradley, Jr., Eric Holderbaum, Rudy Negrete, Robert Howard, Pamela Goodemote, Gerard Lopatka, David Kaplan, and Judy Grant.

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The April 28, 1999 judgment and order of the Court of Appeals, whose judgment is herein sought to be reviewed, is contained in Case No. 98-3196 of the United Court of Appeals for the Seventh Circuit and was rendered on April 28, 1999. The order of the court is unpublished. The judgment and order are reprinted in the Appendix to this Petition, pp. 1-5.

The prior judgment of the United States District Court for the Northern District of Illinois was entered on July 1, 1998, and is contained in Case No. 97 C 1424 of the United States District Court for the Northern District of Illinois. This judgment and the memorandum opinion and order of the District Court are unpublished and are reprinted in the Appendix to this Petition, pp. 6-30.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Citations for the following provisions in question are listed below. The pertinent text of these provisions is set forth at Appendix W to this Petition. The citations of these provisions are:

1. Fourth Amendment of the United States Constitution.
2. Fifth Amendment of the United States Constitution.
3. 18 U.S.C. § 930(g)(2).
4. Rules of Professional Conduct for the Northern District of Illinois, § 3.7(b) and Comment.

STATEMENT OF THE CASE

Basis of Federal Jurisdiction in Court of First Instance

This is, in part, a civil rights action, brought by Martin Rosenthal in the Federal District Court for the Northern District of Illinois, on March 3, 1997. The civil rights portion of the complaint, setting forth violations of the Fourth and Fifth Amendments, was brought pursuant to 28 U.S.C. § 1331 (federal question). The action also seeks an injunction and declaratory judgment, pursuant to 28 U.S.C. § 2201 et seq. (declaratory judgment). The action further seeks damages for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), pursuant to 18 U.S.C. § 1964(a), (c), and (d) (RICO), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1337 (commerce).

Background

Martin Rosenthal, the plaintiff, has worked as an attorney for the Chicago-South office of the Office of Hearings and Appeals ("OHA") of the Social Security Administration ("SSA"), since March of 1986. While employed at the Chicago-South office, Rosenthal has reported several administrative law judges for breaches of law and ethics, including alleged violations of the Hatch Act, abuse of disability claimants at hearings, and arbitrary denials of disability claims. Original Complaint ("OC"), 14.

Rosenthal also has a pocketknife. It is a Swiss Army "Super Tinker" pocketknife, manufactured by Victorinox. *Id.* 18. Rosenthal purchased this pocketknife at Radio Shack on June 20, 1994. App.39-42. The largest blade, the cutting edge, is two and five-sixteenth inches long, as shown from the photocopy of the blade with a ruler next to it. App.39. The distance from the tip to the handle of the "Super Tinker," including both the blade and the tang, the blunt portion of metal between the blade and the handle, is exactly two and eleven-sixteenth inches. *Id.* Other employees at the Chicago-South office, including a prior supervising attorney, Dennis Green, also carried Swiss Army pocketknives at work and used them. OC, Ex."N," 2. Rosenthal had carried this pocketknife, or one

smaller than it, on his keychain for the entire ten years that he had worked for the OHA. *Id.*

On about January 10, 1996, Rosenthal was speaking to another staff attorney, Gerard Lopatka, in Lopatka's office and Rosenthal assisted Lopatka by using his pocketknife to remove a jammed staple from Lopatka's stapler. TAVC, at attached Second Amended Complaint ("SAC"), 34.

The First Seizure

At about 4:45 P.M., on Tuesday, January 16, 1996, Rosenthal was typing on his computer in his office when Bonny Barezky, the Acting Hearing Office Chief Administrative Law Judge of the Chicago-South Office, came to his office. OC, 15. Barezky asked Rosenthal if he had a knife and he answered that he had a pocketknife. Barezky told Rosenthal to give his pocketknife to the office guard, Robert Howard. OC, 15. Rosenthal informed Barezky he would talk to his union steward and Barezky left.

Rosenthal spoke briefly with Douglas Gilmer, another staff attorney at the Chicago-South office. App. 51-53. Rosenthal also called his union steward, Norman Milsk, and typed two original receipts for his pocketknife. While waiting for these receipts to print on the printer, Barezky and Howard came to Rosenthal's office. Milsk then called Rosenthal back and asked to talk to Barezky on the telephone. Rosenthal told Barezky that his union steward wished to talk to her, but Barezky said she would not talk to anybody. App. 54-56.

At Milsk's suggestion, Rosenthal asked Barezky by what authority she was seizing his pocketknife. *Id.* Barezky replied by showing Rosenthal a copy of a General Services Administration ("GSA") flyer about prohibited weapons. After concluding his conversation with Milsk, Rosenthal told Barezky he would need a receipt for his pocketknife and he obtained the two original receipts from the office printer. Barezky said she would not sign anything, but Howard said he would. Rosenthal then gave his pocketknife and both original receipts to Howard who signed both and gave one signed copy to Rosenthal. App.50. The receipt reads: "Received or [sic] Martin Rosenthal one Swiss Army pocket knife on January 16, 1996."

Rosenthal, Barezky, and Howard then went to Barezky's office on the fifth floor, so that Barezky could copy the receipt which Howard had signed and so that Rosenthal could obtain a copy of the GSA flyer which Barezky had shown him.

While in Barezky's office, Barezky spoke with Patricia Carey, the Regional Management Officer, on the telephone. During this conversation, while on the telephone with Carey, Barezky asked Rosenthal whom he had been talking to on the telephone in his office while she was there. OC, 17. Rosenthal said he would not answer any questions without his union steward present. *Id.* Barezky also handed the receiver to Mr. Rosenthal, at which time Carey told Rosenthal that he was insubordinate. *Id.* Nobody mentioned the length of the blade of the pocketknife. After leaving Barezky's office, Rosenthal did not see any of the defendants again that day.

The Call For Help, The Second Seizure, And The Cover-up

On the morning of the next day, Wednesday, January 17, 1996, Rosenthal called the Federal Protective Service ("FPS"), in order to report the seizure of his pocketknife and get it back. OC, 19-20. Rosenthal reported the seizure to Daniel Kvachkoff, then the District Director of the FPS in Chicago. OC, 20. Rosenthal informed Kvachkoff that the pocketknife was an ordinary Swiss Army pocketknife, with a can opener, a bottle opener, and a blade. *Id.* Kvachkoff said he would have to look at the pocketknife himself and he dispatched Cleophas Bradley, Jr., a special agent of the FPS. *Id.*

Bradley came to Rosenthal's office that morning, said he would talk to Barezky, and said he would measure the blade of the pocketknife and tell Rosenthal if the pocketknife was legal. *Id.* Eric Holderbaum of the FPS also came with Bradley to Barezky's office and was present when Bradley said that Rosenthal's pocketknife was illegal. OC, Ex."L," 2.

Rosenthal called Bradley on the telephone, later in the afternoon of Wednesday, January 17, 1996. *Id.* Bradley told Rosenthal that the pocketknife was illegal and that it had a blade of almost two and three-quarter inches. *Id.* He also told Rosenthal that Rosenthal would not be getting the pocketknife back. *Id.* Bradley also said he had reported the seizure to the U.S. Attorney, but that

the U.S. Attorney was not going to prosecute, because it would not be in the interest of Rosenthal or the SSA. *Id.* 20-21.

Rosenthal tape-recorded his conversations with Bradley, in which Bradley repeatedly said the blade was "... a little less than two and three-quarter inches." App.57-62. In regard to what Bradley actually measured, he said: "It's the whole length of the blade, not just the sharp part of the blade. It's the entire length of the blade." App.59. It is clear that Bradley measured the distance between the tip of the blade and the handle, so that he included the tang, in addition to the blade, the cutting edge, in order to arrive at his measurement of "... a little less than two and three-quarters." App.57 and 59.

On Thursday, January 18, 1996, over the lunch hour, Rosenthal purchased a Swiss Army "Manager" pocketknife, in order to replace the "Super Tinker" which he would not be getting back. OC, Ex."N," 4. The receipt for this pocketknife which Rosenthal purchased at Otto Pomper, Inc., in Chicago, is also contained in the record. Plaintiff's Submission For Prove-Up of Damages. This pocketknife is even smaller than the "Super Tinker." OC, Ex."N," 4.

Rosenthal also purchased ties that had Swiss Army pocketknives on them. *Id.* On return to the office, Rosenthal showed the pocketknife and ties to Gilmer and Lopatka. OC, Ex."A," 1.

On the same day, Thursday, January 18, 1996, at about 5:20 P.M., Barezky and Gustav Anderson, the office manager, came to the office of Rosenthal. OC, 21. Barezky told Rosenthal that he was being placed on administrative leave and was not to return to the office, but was to call in each day. *Id.* at 21-22. Barezky also had Rosenthal clean out his desk and she and Anderson escorted Rosenthal to the lobby. *Id.* at 22. According to Barezky, both she and Anderson saw that Rosenthal was wearing "... yet another swiss army knife on his keychain." App.65. That statement is correct, because the pocketknife which Barezky and Howard seized is a Swiss Army pocketknife and the second one which Rosenthal purchased on January 18, 1996, is also.

On Monday, January 22, 1996, Rosenthal asked Kvachkoff to look at the pocketknife himself, but he refused to do so and also said he could not correct anything he could not see.

On January 22, 1996, Bradley identified the pocketknife as a "Swiss pocketknife" and said that Rosenthal would not get it back, without the approval of the U.S. Attorney, because it was illegal. App.60. Bradley told Rosenthal to call "GSA legal." App.62.

Following up on Bradley's suggestion, Rosenthal called Paul Maxse, the regional counsel for GSA in Chicago. OC 23. Rosenthal told Maxse that the pocketknife was an ordinary Swiss Army pocketknife and that there was no reason for the seizure. Maxse said he would check on this matter with the FPS and get back to Rosenthal. *Id.* Bradley later called Rosenthal on Monday, January 22, 1996, and said that Rosenthal could pick up his pocketknife from Rudy Negrete at the FPS office, because the U.S. Attorney was not going to prosecute. *Id.* Negrete is also a special agent of the FPS. *Id.*

At the FPS office, Neqrete brought the pocketknife to Rosenthal in a brown Manila envelope and asked Rosenthal if he could identify the pocketknife. *Id.* at 24. Rosenthal identified it and Negrete gave it to Rosenthal. Negrete also told Rosenthal that the pocketknife is illegal and that, for this reason, he had to escort Rosenthal to the outer door of the building. *Id.* Negrete then escorted Rosenthal out of the building. Later that day, Monday, January 22, 1996, at 5:30 P.M., Rosenthal finished cleaning out his office desk.

Rosenthal made his daily call to Barezky on Tuesday, January 30, 1996, as Barezky had instructed. *Id.* at 25. Barezky instructed him to return to the office and that he could not bring any knives or dangerous weapons with him. *Id.* When Rosenthal came to the office, Howard escorted him to Barezky's office, in plain view of the entire office. *Id.* Barezky asked Rosenthal if he had had any knives or dangerous weapons with him. *Id.* Rosenthal refused to answer without his union steward present. *Id.* Howard again escorted Rosenthal out of the office, again in full view of the office. *Id.*

When Rosenthal returned to the Chicago-South office, with his union steward, Milsk, Howard again escorted them, in full view of the entire office, to Barezky's office. App.55. Rosenthal then consulted with Milsk and answered that he had brought no knives or dangerous weapons with him. *Id.*

Barezky told Rosenthal and Milsk that these precautions were necessary, in regard to Rosenthal, because of what happened in

Oklahoma City. *Id.* She also told them that that she had personally measured a four inch blade. *Id.* Barezky also told Rosenthal and Milsk that several employees were concerned for their safety, because of Rosenthal and his pocketknife. App.55.

For these reasons, Barezky stated, an FPS guard would be posted on the twelfth floor where the office of the attorneys is located. OC at 26. Barezky then had Howard again escort Rosenthal, in plain view of the entire office, back to his office on the twelfth floor. *Id.*

Punishment For An Alleged Federal Crime

On February 23, 1996, Barezky gave Rosenthal a proposal to suspend him for 14 calendar days, on the grounds that he had possessed a dangerous weapon and was insubordinate. *Id.* The proposal also contained allegations that Rosenthal had possessed a prohibited weapon prior to the events of January 16, 1996, and that he had used it to commit several acts of assault or menacing against Barezky herself, starting in October, 1995. O.C. at 27.

The proposal and handwritten statements that Rosenthal obtained on November 4, 1996, contained reports by Barezky and Howard that they had measured the blade of Rosenthal's pocketknife. Barezky said she measured a blade of exactly three and three-quarter inches. App.64. Howard said he measured a blade of three and a half to three and three-quarter inches. App.66. Both purported to measure the cutting edge only.

Stephen Jon Ahlgren, the Regional Chief Administrative Law Judge, made the decision to suspend Rosenthal. OC 35. Ahlgren was also named as a witness before the Office of Special Counsel ("OSC"), in regard to the complaint which Rosenthal had filed with that agency, in which Barezky was the subject of the investigation. The topic of the investigation was Barezky's proposed suspension of Rosenthal. Ahlgren did give a statement to the OSC. App.80 and 81. Rosenthal had also named Ahlgren in the Notice of Claim which he had filed with SSA and GSA, so that Ahlgren could expect to be a defendant in a law suit. O.C., at Ex."V," 1. Rosenthal's union attorney, Kathleen Heiman, called upon Ahlgren to recuse himself from making the decision to suspend Rosenthal. *Id.*

Ahlgren was also a witness on behalf of Barezky, in regard to the complaint which Rosenthal filed against her with the Attorney Registration and Disciplinary Commission ("ARDC") of the Illinois Supreme Court. O.C. at Ex."W." As Ahlgren told the ARDC:

> I fully support Judge Barezky's decision .... I believe his [Rosenthal's] actions are totally retaliatory and without merit. Indeed, the filing of such a complaint with your Commission against a Judge merely doing her job is reflective of spurious and unprofessional conduct. *Id.* at 2.

Ahlgren also functioned as prosecutor in compiling the police reports from the FPS which were used to justify the suspension of Rosenthal. OC at 35. Finally, Ahlgren withheld the statements of the other defendants and did not disclose them until after Rosenthal had been punished. In spite of all the above, Ahlgren did not recuse himself and, on July 19, 1996, made his decision to suspend Rosenthal for 14 calendar days. OC at 35.

Ahlgren also referred Rosenthal to the Employee Assistance Program and recommended: "... follow any advice they may offer to you." O.C. at Ex."X," 8. Ahlgren also concluded that Rosenthal had been "less than truthful" and he stated: "... you have shown no remorse for your actions nor given any assurances that you would not repeat such behavior in the future." *Id.*

Ahlgren punished Rosenthal for committing a federal crime, based on the allegations of Barezky and Howard. Ahlgren also punished Rosenthal for insubordination, consisting of allegedly refusing to hand over his pocketknife and for allegedly refusing to tell Barezky who was on the telephone at the time she seized his pocketknife. As Ahlgren put it: "I do not find any reason why Judge Barezky and/or Officer Howard would make false statements regarding their measurements of the knife blade, nor do I believe they did so." OC at Ex. "X," 4. Ahlgren also concluded that Rosenthal's allegation about having the "Super Tinker" was "self serving." *Id.*

Rosenthal served a 14 day suspension without pay, during the pay period ending August 17, 1996, as shown by his earnings statement. O.C. at Ex."Y."

Charles R. Boyer, the U.S. Chief Administrative Law Judge of SSA, reviewed Ahlgren's decision. Rosenthal requested a full due

process hearing before Boyer made his decision. OC at 44. However, Boyer never replied and then upheld the discipline of Rosenthal and decided the Swiss Army "Super Tinker" pocketknife is a dangerous weapon, in accordance with a technical, trade definition used in the cutlery industry. *Id.* Plaintiff's Brief On Motion For Discovery And Evidentiary Hearing On Issue Of Official Capacity ("MFD"), Ex."X," at 3.

Boyer also decided that Rosenthal may not possess the "Super Tinker" pocketknife. *Id.* at 7. As Boyer put it: "You have now been educated ..." *Id.* at 7. Because the chain of custody was broken when the FPS returned the pocketknife to Rosenthal, Boyer stated Rosenthal was "exonerated" from the charge of possessing a dangerous weapon. *Id.* However, Boyer stated that Barezky and Howard measured the blade lengths which they reported. *Id.* at 3.

The Aftermath

On November 4, 1996, after serving his suspension without pay, Rosenthal obtained from his union attorney copies of fabricated statements which several defendants had written during January and February of 1996. TAVC, at attached Second Amended Complaint ("SAC") at 24-38. These statements were communicated to third parties via faxes, by long distance telephone, and by the U.S. mail. O.C. at Ex."M," 22 and 38.

Barezky stated that Rosenthal had menaced her on several occasions with a large, illegal pocketknife and that he is "... a danger to the safety of the employees." App.63-65. Concerning one alleged encounter with Rosenthal, during which he was supposed to have assaulted or menaced Barezky with a pocketknife, Barezky stated: "I was again frightened to death. My heart began to race." App.64. This statement and all other statements relating to such acts are entirely false and fabricated. Barezky even stated she told Rosenthal not to use his pocketknife during their private conversations. MFD at Ex."N," p.6. However, Rosenthal tape-recorded his only two private meetings with Barezky and there was no mention of any pocketknife. MFD at Ex."T."

Pamela Goodemote, the supervising attorney at the time of the seizure, stated that Rosenthal had menaced her with a four-inch blade in August, 1990, and that he had done this repeatedly to another

administrative law judge, Patricia Kelly. TAVC, at attached SAC, 29 and 30. Goodemote also stated that if Rosenthal came back to the Chicago-South office, it would be for her "... tantamount to a death sentence." *Id.* at 32. Goodemote also said that Rosenthal had stalked her at Union Station in Chicago. *Id.* at 31. She also said Rosenthal was a threat to harm her daughter. *Id.* 32. All these statements are entirely false and fabricated.

Lopatka said that Rosenthal had taken from his pocket a "... very large red hunting knife..." and that he was also afraid of a larger fixed blade knife which was "... even more threatening." *Id.* at 34. These statements are false and fabricated.

David Kaplan, another staff attorney, stated he had also seen Rosenthal's pocketknife and that it was "... only a matter of time before he slashes or kills one of us." *Id.* 36. Kaplan also said that if Rosenthal came back to the office, Kaplan would be "... quaking in fear ..." *Id.* Kaplan stated: "Why do we have to leave for work every day not knowing if we will return in a body bag?" *Id.* These statements are entirely false and fabricated.

Judy Grant, another staff attorney, stated: "Since I have become one of his prime targets, I am terrified about what he might do .... I do not believe I can continue to work under these conditions." *Id.* 38. These statements are also entirely false and fabricated.

While this case was pending in the District Court, Donna Van Polen, one of the staff attorneys in the Chicago-South office asked Barezky about reports that Rosenthal was dangerous. App.68-70. In her affidavit, Van Polen reported that Barezky said that she herself was not the least bit afraid of Rosenthal and never thought that he was dangerous. *Id.*

After this case had been dismissed by the District Court, Lopatka told Van Polen that Mr. Rosenthal was a "nice guy" and that he did not think that Rosenthal was dangerous. App.71-73. However, Lopatka said that Barezky had called several of the attorneys to a meeting, told them to write statements, and told them to use "buzz words" about Rosenthal. *Id.* He also said that when the head of the office requests such a statement, it is necessary to give it. *Id.*

The seizure of Rosenthal's pocketknife was supposed to be investigated by Raymond McKay, a facilitator for SSA. OC at 30.

However, McKay never spoke with Rosenthal and, as far as can be determined, McKay made no effort to examine the pocketknife or to have it examined. *Id.* There is no indication that McKay ever generated any investigative report or investigative file. OC, at Ex."N," Statement by Attorney Kathleen Heiman.

Upon information and belief, it was Frank McGinley, then the Regional Personnel Officer, who drafted the statements which Barezky read to Rosenthal and Milsk throughout the above events, although there is no indication that McGinley attempted to investigate the nature of the pocketknife or anything else. OC at 36.

A letter from Bryan Sewell, the buyer for Radio Shack, confirms that the Swiss Army "Super Tinker" pocketknife is sold by Radio Shack. App.44. The Radio Shack package in which the "Super Tinker" came also states that the "Super Tinker" is a "Radio Shack Exclusive." App.41.

The record also contains a letter from Dan Bilger, a cutlery dealer in Chicago, to Ahlgren, noting that there is no Victorinox Swiss Army knife available in the United States with a cutting edge longer than three and one-sixteenth inches. App.45.

James Kennedy, the former Chairman and Chief Executive Officer of The Forschner Group which distributes Victorinox Swiss Army knives has also written an affidavit, stating that the blade of the "Super Tinker" is two and three-eighth inches long, within the limit set by the dangerous weapon statute, 18 U.S.C. § 930(g)(2). App.43.

An expert in knives, Charles W. Karwan, also wrote an affidavit, stating there is no red-handled Swiss Army pocketknife with a cutting edge longer than three and one-sixteenth inches. App.46.

Karwan also stated that the term "animate" does not appear in any cutlery references. *Id.* However, Karwan also stated that, in his expert opinion, the term "animate," in reference to a folding knife, would refer to the entire part of the knife which moves outside the handle, meaning both the cutting edge, the true blade, and the tang, the blunt part between the cutting edge and the handle. App.46 and 47. He also stated this would be two and eleven-sixteenth inches for the "Super Tinker." *Id.* This corresponds to the "a little less than two and three-quarters" which Bradley said he measured as the "actual animate part of the blade." *Supra*, at 5.

As discussed above, the defendants identified Rosenthal's pocketknife as a Swiss Army pocketknife on several occasions. No defendant ever identified another manufacturer of the pocketknife which Barezky, Howard, and Bradley purported to handle, open, and measure. None of these people ever produced the pocketknife or any photocopy of the alleged offending blade.

Although Barezky never mentioned Rosenthal's pocketknife in any private meetings, she and Rosenthal did discuss serious problems with the decisions of one particular administrative law judge -- Edward R. Gustafson. On January 10, 1996, Barezky told Rosenthal it was not in his job description to question the competence or ethics of administrative law judges. MFD, at Ex."T," p.20.

Record of Punishment For A Federal Crime And Permanent Prohibitions

The punishment of Rosenthal for a federal crime, having a dangerous weapon, is now history and part of the permanent SSA record for Rosenthal. It is contained in the "Notification of Personnel Action" which SSA created, showing "POSSESSION OF A PROHIBITED WEAPON ON FEDERAL PREMISES" and "INSUBORDINATE CONDUCT." App.79. This record of punishment is based entirely on the fabricated accounts noted above, including fictitious blade lengths and accounts of dangerous and insubordinate conduct. As also noted above, Rosenthal is now permanently prohibited from possessing the "Super Tinker" pocketknife -- a legal pocketknife under 18 U.S.C. § 930(g)(2).

Although Rosenthal filed the complaint with the OSC, as noted above, the record contains no evidence that the OSC provided Rosenthal with any relief, because, in fact, that agency never did.

The Decisions of the District Court

Rosenthal filed a Third Amended Verified Complaint ("TAVC") in Federal District Court which consists of thirteen counts. Counts one, two, and three set forth violations of the Fourth and Fifth Amendments of the U.S. Constitution, because of the seizures described above.

The complaint alleges that the Barezky and Howard seized Rosenthal's personal property, a Swiss Army "Super Tinker" pocketknife, which the defendants knew to be legal; and that the FPS officers noted above committed another wrongful and intentional seizure of the plaintiff's pocketknife after Rosenthal called them for help. Their conduct included knowingly and intentionally giving false police reports and covering up for other officers who did so.

The complaint also alleges that the FPS officers noted above violated Rosenthal's Fifth Amendment rights, because they knowingly and wrongfully reported to government agencies that Rosenthal's pocketknife was a dangerous weapon, in violation of the federal criminal code. Further, the complaint states that the defendants punished Rosenthal for a federal crime, possession of dangerous weapon, under a statute, 18 U.S.C. § 930(g)(2), which is vague and overbroad. TAVC, at attached Second Amended Complaint ("SAC") at 17-21.

Counts four through twelve are actions to recover for intentional and negligent infliction of mental distress, conversion, libel, and slander, relating to the events noted in the above paragraphs. TAVC, at attached SAC at 22-38.

The thirteenth count states a claim under the Racketeer Influenced and Corrupt Organization Act ("RICO"). TAVC at 9-12, and attached SAC at 39-42. As set forth in that count, the defendants conducted or participated in a racketeering enterprise, through which they used the U.S. mail, faxes, and long distance telephone conversations, in order to disseminate false police reports and other false and fraudulent information to and about Rosenthal.

The Office of the U.S. Attorney filed a certification that the defendants acted in their official capacity, in order to substitute the United States for the defendants, on state tort counts. App.82-84.

Rosenthal filed a Motion For Discovery And An Evidentiary Hearing On The Issue Of Official Capacity. MFD. On January 14, 1998, the District Court ordered that the United States submit affidavits or other documents, showing that the defendants acted in their official capacity, and addressing all the factual issues raised in the plaintiff's motion for discovery. App.35-38. The District Court stated in its order of dismissal that it denied Rosenthal's motion on official capacity on January 14, 1998. App.23. However, this motion

was not denied on that date and, in fact, was never ruled on by the District Court.

The plaintiff moved to disqualify the Office of U.S. Attorney from representation of the defendants, because Assistant U.S. Attorney Fullerton received the report from Bradley, concerning the pocketknife, and the head of the Chief of the Criminal Division, Gary Shapiro, stated that no matter was pending in the Office of the U.S. Attorney concerning Rosenthal's pocketknife and that the U.S. Attorney had taken no position on any discipline of Rosenthal. App.74-78. The District Court orally denied this motion on February 11, 1998. Plaintiff's Principal Brief ("PPB"), at App.42 and 43.

On May 29, 1998, the District Court entered a Memorandum and Order which dismissed the complaint as to all defendants, except Howard. App.6-30. The District Court decided that all of Rosenthal's claims are barred by the Civil Service Reform Act. App.13. The court also decided that the defendants have qualified immunity, that the criminal statute involved is not vague, and that the defendants could not be sued, because of sovereign immunity. App.19-25. The District Court further stated that Rosenthal had failed to set forth a RICO claim, because he had failed to show how the defendants constituted a racketeering enterprise and failed to show how the conduct of the defendants constituted mail or wire fraud. App.27.

On June 29, 1998, the District Court vacated its order of default judgment against Howard and dismissed the complaint against Howard who never answered the complaint after being personally served. App.31-34.

The Decision of the Court of Appeals

The judgment of the Court of Appeals, entered on April 28, 1999, was to affirm the dismissal of the District Court. App.1-5. In an unpublished order, the court held that all of Rosenthal's claims attack a personnel action, so that Rosenthal has the right to bring his dispute before the Merit System Protection Board. Therefore, the court reasoned, Rosenthal cannot complain of alleged procedural deficiencies, so that the District Court lacked jurisdiction over Rosenthal's claims. App.5.

REASONS FOR GRANTING THE WRIT

I. The Circuit Court Of Appeals Sanctioned A Departure Of The District Court From The Accepted And Usual Course Of Judicial Proceedings, So That It Is Necessary For The Supreme Court To Exercise Its Supervisory Power.

A. The District Court Never Ruled On Rosenthal's Motion For Discovery And An Evidentiary Hearing On The Issue Of The Capacity Of The Defendants; The Court Of Appeals Never Addressed This Failure.

The government certified that the defendants acted within the scope of their employment. App.37. Rosenthal filed a motion for discovery and an evidentiary hearing on the issue of capacity in which the defendants were acting. ("MFD"). Among the documents attached to that motion were sections C through Q of the Appendix to this petition. The District Court, in response, ordered the government to submit an affidavit or declaration which "... should be directed at all of the factual issues raised plaintiff's motion for discovery." App.38.

Thomas P. Walsh of the Office of the U.S. Attorney certified that the defendants acted within scope of their employment. He said he assumed that the facts stated in the complaint are true and stated that the actions of the defendants took place during working hours and that all their actions " ... are of the type that employees are reasonably expected to engage in." App.83. However, the complaint alleges that the defendants knowingly seized a legal item of personal property, fabricated accounts that it was illegal, falsely reported Rosenthal for criminal conduct to the U.S. Attorney and other government agencies, and knowingly and wrongfully punished Rosenthal for a federal crime.

This conduct of the defendants was criminal, tortious, and egregious and completely outside the scope of the employment of the defendants. Such conduct serves no purpose of the United States, their employer. Under Illinois law, this conduct, therefore, supplies no official capacity, governmental immunity. *Snodgrass v. Jones*, 957 F.2d 482, 485 (7th Cir. 1992). The defendants acted in an

individual capacity, completely outside the scope of any statutory authority, so that the United States should not have been substituted for them. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-688 (1949).

The contradictory statements of Bradley, Barezky, and Howard, concerning the length of the blade of Rosenthal's pocketknife, establish that they fabricated their accounts of a dangerous weapon. Appendix Sections N, O, and P. Barezky wrote at least two dozen handwritten pages, alleging three occasions on which Rosenthal was supposed to have threatened and assaulted her with a large, illegal pocketknife which she said she personally measured. Appendix O. As Barezky put it: "I again was frightened to death." App.64. Barezky even compared Rosenthal to the Oklahoma City bomber. App.55. Yet, after Rosenthal filed this law suit, Barezky told Van Polen, another staff attorney, that Rosenthal was a "role model employee," that she was never afraid of him, and that she never felt he was dangerous. App.68 and 69. Such conduct establishes that the defendants knew what they did was wrong, so they have no right to claim absolute, governmental immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985).

The motion for discovery and an evidentiary hearing on capacity also contained statements and affidavits from experts in cutlery, establishing that the Swiss Army pocketknife, described in detail by Barezky, Bradley, and Howard, does not exist. Appendix Sections G, I, and J. Howard signed a receipt for "one Swiss Army pocket knife." App.50.

Bradley made clear he had seized a "Swiss pocketknife." App.61. Barezky stated that both pocketknives which she and Anderson, the office manager, observed were "swiss army" knives. App.65. This further established the intentionally tortious, egregious conduct of the defendants, so that they were entitled to no scope-of-employment immunity at all. *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993).

As noted above, the District Court stated in its order of dismissal that it denied Rosenthal's motion on official capacity on January 14, 1998. App.23. However, this motion was not denied on that date and, in fact, was never ruled on by the lower court. Therefore, the lower court's decision makes it appear that the court considered and ruled on a motion which it never actually ruled on at

all. This was a critical motion. The detailed evidence contained with it establish that the defendants were not entitled to any claim of official capacity, scope-of-employment, or governmental immunity. They had no right to claim sovereign immunity, because their acts were both criminal and intentionally tortious. Such conduct, like perjury, focuses upon and offends the "honor of the sovereign." *Mooney v. Holohan*, 294 U.S. 103 (1935). The failure to even rule on the motion, let alone grant it, made it impossible for Rosenthal to obtain the required evidentiary hearing at which the defendants would have had to make their statements under oath and cross examination.

The failure of the District Court to rule on the motion for discovery and an evidentiary hearing also had a major impact on the District Court's decision that Rosenthal's case was preempted by the Civil Service Reform Act. The Supreme Court has made clear that such preemption applies only when governmental employees are engaged in "official acts," in which case they should not be subject to personal liability. *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). The evidence which was a part of the motion for discovery and an evidentiary hearing on the issue of capacity was definite and not speculative in any way. That evidence establishes that the defendants never engaged in any "official acts." They acted for their benefit alone and all that they did was both criminal and tortious, in violation of the Constitution, RICO, and Illinois common law.

The Supreme Court has also made clear that a warrantless search and an uncompensated taking are completely outside the Civil Service System and are not even "personnel actions within the statutory scheme." *Bush v. Lucas*, 462 U.S. 367, 385 n.28 (1983). A hearing on official capacity would have further established that the defendants performed an unreasonable and warrantless search and seizure of Rosenthal's pocketknife, in violation of the Fourth Amendment.

Such a hearing would have established not only that they have no scope-of-employment or governmental immunity, but that they acted totally outside the "statutory scheme," so that this is not a civil service matter at all. In addition, the Bradley tapes show that Bradley repeatedly told Rosenthal he would never get his pocketknife back and that it was seized as illegal contraband. App.57, 58, 60, and 61. That is why Rosenthal purchased a new pocketknife the next day. *Supra*, at 6.

A hearing would have further established that this was a wholly unreasonable and uncompensated taking. Such a significant taking by government is not *de minimis* and is within the purview of the Due Process clauses of both the Fifth and Fourteenth Amendments. The gravity of such a seizure is irrelevant to the question of whether account must be taken of the Due Process Clause. *Ingraham v. Wright*, 430 U.S. 651 (1977); and *Goss v. Lopez*, 419 U.S. 565 (1975). This uncompensated taking also constituted conversion, in violation of the common law of Illinois, as also set forth in the complaint.

The Fourth Amendment violations and common law conversion, as set forth in the complaint, and the entire record of the case in the District Court establish both a warrantless search and seizure and an uncompensated taking. There has never been any assertion by the government that there was ever a warrant or any compensation paid to Rosenthal for the seizure for of his pocketknife. A hearing on the issue of the capacity of the defendants would have confirmed what definite evidence already showed -- that the defendants acted completely outside the statutory scheme, so that there never was any "personnel action" at all.

Rosenthal sued the defendants in their individual capacities. Because this action was against federal officers, the District Court had the obligation to at least examine the facts of the case and the entire record, in order to determine whether there was a suit against the individual defendants, in addition to the federal government. *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945); and *Blaney v. United States*, 34 F.3d 509 (7th Cir. 1994).

Rosenthal raised this issue and discussed it fully as reversible error in briefs filed with the Court of Appeals. ("PPB"), at 6, 50, 51, 56, and 57; and Plaintiff's Reply Brief ("PRB"), at 16 and 17). The Circuit Court noted the scope-of-employment certification by the U.S. Attorney, but made no mention of the motion on the issue of official capacity and no mention of the fact that the District Court had failed to rule on the motion. App.4.

This is reversible error which requires that the Supreme Court exercise its supervisory power by reversing the decision of the Court of Appeals. A large number of civil rights litigants may well be affected by the failure of federal courts to rule on such a critical motion. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469

(1992). This is particularly evident in a case where the court says it did rule on the motion and denied it, but the court never ruled at all. Uninformed parties and litigants may not even know that this occurred. Such a failure, therefore, presents an important issue. *Burson v. Freeman*, 504 U.S. 191, 194 (1992).

B. Both The District Court And Court Of Appeals Failed To Apply The Required Standards Of Review.

As noted by the District Court, on a motion for dismissal the court must presume all of the well-pleaded allegations of the complaint to be true. *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2, (1977). In addition, the court must view those allegations in the light most favorable to the plaintiff. *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1039 (7th Cir. 1987). Dismissal is proper only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). App.12.

In spite of the well settled rules of review of the facts, noted above, the lower court assumed that several of the well pleaded facts were not true, including the intentionally false reporting of the nature of Rosenthal's pocketknife and intentionally false reports of his conduct at and prior to the time it was seized. Rosenthal pleaded that the seizure carried out by the defendants was not objectively reasonable, because the defendants knew for a fact that his pocketknife was legal, that they conspired with each other to cover up this fact, and that they falsified this fact to the Office of the U.S. Attorney. R.65, TAVC, at attached SAC 17.

These are the well pleaded facts which the lower court should have taken to be true. However, the lower court took these facts to be false and concluded instead: "Taking possession of plaintiff's pocket knife was necessary since it was reasonably suspected to be unlawful." App.16. This conclusion violates the standard of review which the lower court stated it is bound to follow and is in conflict with the Supreme Court decisions of *Miree* and *Conley*. *Supra*.

Considering the additional well pleaded facts in the complaint, it is virtually impossible for the seizure by the defendants to have been reasonable. No two defendants who claimed to have actually measured the blade of Rosenthal's pocketknife reported the same

blade length. Barezky told Rosenthal and his union steward that the blade was four inches long. App.55. She later said she measured the cutting edge as three and three-quarter inches. App.64. Howard said the cutting edge was three and a half to three and three-quarter inches. App.66. Both of them claimed to measure what they defined as the blade -- the cutting edge only.

Bradley said repeatedly that the blade was "... a little less than two and three-quarters." Bradley also said he was measuring the "... full length of the, uh, actual animate part of the blade." "It's the whole length of the blade, not just the sharp part of the blade." App.57-59. It is clear from this description that Bradley was indeed referring to the Swiss Army "Super Tinker" pocketknife. The only problem is that he was not measuring the blade at all. He measured the distance between the tip and the handle, including the tang. Karwan's affidavit makes clear the deception that Bradley practiced. App.46-49.

Based on these wildly differing measurements of the blade and the differing definitions on what a blade is, it is clear that the defendants concocted their stories, in order justify their seizure of Rosenthal's pocketknife and in order to permanently tar him with punishment for a federal crime. Yet, the District Court gave these stories full credence and used them to justify their seizure of Rosenthal's property and their punishment of Rosenthal for a federal crime. This acceptance of the opposite of the well pleaded facts, in regard to what the defendants "reasonably suspected," achieved the opposite of the result which the Supreme Court mandated in *Miree* and *Conley*. *Supra*. As discussed above, this not only violated the terms of the complaint, but was impossible, in light of the obvious fabrications of the defendants. This was the first violation of the applicable standard of review, as set forth in *Miree* and *Conley*. *Supra*.

The Circuit Court of Appeals sanctioned this departure from the accepted standard of review. The Circuit Court agreed with the analysis of the District Court and concluded: "Bringing a federal weapon onto a federal facility is both a federal crime and a violation of the terms of employment of one who works on a federal facility." App.5. In regard to Rosenthal, the Circuit Court stated: "Had Barezky seized the knife and referred the matter to the U.S. Attorney's Office, the seizure would be the first step in a criminal

prosecution." App.5. Under this view, Rosenthal had indeed committed a federal crime.

Second, in addition to reversing the applicable standard of review, concerning the conduct of the defendants, the Court of Appeals, like the District Court, ignored the language of the "dangerous weapon" statute. A dangerous weapon is defined in 18 U.S.C. § 930(g)(2) as a "... weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of causing death or serious bodily injury ...." App.85. However, it also states that this does not include a pocketknife with "a blade of less than 2½ inches." *Id.*

The criminal statute does not define the term "blade." Therefore is necessary to give the term its ordinary meaning or acceptation. *United States v. P. Koenig Coal*, 270 U.S. 512 (1926). The District Court accepted the plaintiff's definition of blade: "the flat-edged cutting part of a cutting tool or weapon." The American Heritage Dictionary of the English Language (Dell Publishing Co., Inc., 1970, p.75). App.21 and 85. The flat-edged cutting part of the Swiss Army "Super Tinker" is 2 5/16 inches long, as the photocopy shows. App.39. The blade is simply the cutting edge. This is the universal ordinary, common acceptation of the word.

It is based on this ordinary definition of "blade" that Victorinox manufactures Swiss Army pocketknives and The Forschner Group distributes them in the United States. James Kennedy, the past chairman and chief executive officer of The Forschner Group stated in his affidavit that the blade of the "Super Tinker," measured in eighths of an inch, is two and three-eighths inches long. App.43. The affidavit of Charles Karwan, an expert in knives, also states that the cutting edge of the "Super Tinker," the true blade, is two and five-sixteenth inches long. App.46-49.

Even though the District Court stated that it accepted the dictionary definition set forth above, it went on to find that the "Super Tinker" blade is longer. In order to do so, the court added on the tang, the blunt part of metal between the cutting edge and the handle. App.21. As the lower court put it: "The definition of a blade does not exclude the part nearest the handle of a knife." *Id.* However, the tang is not part of the blade for two reasons. First the tang is not "flat-edged." It is blunt. Second, the tang does not belong to the "cutting part," because it will not cut anything. Karwan, in his

affidavit, discusses the difference between the true blade, the cutting edge, and what is known in the cutlery industry as the "master blade" -- the combination of the tang and cutting edge together. App.46 and 47.

It is this misunderstanding about the definition of the "blade" which Bradley took advantage of when he told Rosenthal that he was measuring the "... whole length of the blade, not just the sharp part of the blade." App.59. Both the District Court and the Court of Appeals chose to accept this definition and to ignore the ordinary, "common acceptation" of the word "blade." This was a clear violation of the standard for construction of a criminal statute laid down by the Supreme Court in *Koenig Coal*. *Supra*, at 21. These are obvious violations of the applicable standards of review, in regard to viewing the well pleaded facts of a complaint, and in construing the undefined terms of a criminal statute. Such obvious and alarming, direct conflicts with the precedents of the Supreme Court strongly favor the Court's granting of this petition for a writ of certiorari. *Lambert v. Wicklund*, 520 U.S. 292 (1997).

C. Both The District Court And Circuit Court Of Appeals Failed To Apply The Required Standard Of Review, In Regard To Conflict of Interest, Which Requires Ordering The Office Of The U.S. Attorney To Withdraw From Representing The Defendants.

As discussed above, Bradley called Assistant U.S. Attorney Stuart Fullerton, in order to make his police report. App.74-77. He stated he told the Assistant U.S. Attorney Fullerton that Rosenthal's pocketknife is illegal. App.58. Bradley said the U.S. Attorney chose not to prosecute and that the U.S. Attorney "... did not want to push the issue." *Id.* Bradley also stated that the U.S. Attorney had been advised of the case and that the pocketknife would not be returned to Rosenthal without the approval of the U.S. Attorney. App.60.

Because the Swiss Army "Super Tinker" pocketknife is legal under the criminal statute at issue, Bradley made a false police report. This was police misconduct, in violation of the Fifth Amendment, as set forth in the second cause of action in the complaint. It was also use of interstate commerce, in violation of RICO, as set forth in the thirteenth cause of action. Fullerton is an essential witness to that

report. Only he received it. Whatever blade length Bradley reported to Fullerton, such a measurement will inevitably conflict with the measurements reported by Barezky and Howard, and possibly by Bradley himself.

The letter from the chief of the criminal division of the U.S. Attorney's Office, Gary Shapiro, establishes that the Office of the U.S. Attorney was not considering criminal prosecution and that the U.S. Attorney had had taken no position on possible discipline of Rosenthal. App.78. Shapiro did not say why this was.

The District Court applied the Rules of Professional Conduct for the Northern District of Illinois, § 3.7(b). PPB, at Appendix 38 and 39. This rule and the comment to it are also included in the Appendix to this Petition. App.86. The District Court recognized that the testimony of Fullerton would have to be prejudicial to the other defendants, before the Office of the U.S. Attorney would have to withdraw from representing the defendants. PPB, at App.39. The District Court denied the motion that the U.S. Attorney be ordered to withdraw, because it would not be prejudicial for Fullerton and Shapiro to testify "... that the decision was made to decline prosecution." *Id.*, at 43.

The problem with the Court's analysis is that the record establishes that the testimony of Fullerton cannot be other than prejudicial to the other defendants. As noted above, Fullerton's testimony will, without doubt, contradict their testimony. The District Court looked only at the possibility that Fullerton and Shapiro would testify only that there was a decision to decline prosecution. They may also state that the reason for this decision was that the U.S. Attorney's office knew the pocketknife was legal.

When Fullerton testifies about what Bradley reported to him, such testimony will surely be prejudicial. The length of the blade which Bradley reported measuring will contradict all or some of the other measurements by the defendants and may even contradict Bradley's subsequent measurement which he gave to Rosenthal. This is the conflict which makes it ethically impossible for the U.S. Attorney to represent any of the defendants. The supervisory power of the Supreme Court is also needed, in order to address this problem, so that necessary witnesses are available to testify in this case and other cases in the future, without the presence of any conflict of interest.

II. The Court of Appeals Decided Important Federal Questions In Ways That Conflict With Relevant Decisions Of The Supreme Court.

A. Both The District Court And Court Of Appeals Failed To Recognize The Right To A Hearing Before Punishment For A Federal Crime.

When the defendants charged Rosenthal with a federal crime, possession of a dangerous weapon, in violation of 18 U.S.C. § 930(g)(2), and related, alleged acts of insubordination related to the seizure of Rosenthal's property, his union attorney requested an oral reply before Ahlgren. As discussed above, there were conflicts of interest which Ahlgren had that prevented him from having the legal capacity to make the decision in Rosenthal's case. *Supra*, at 7 and 8. However, Ahlgren failed to recuse himself and later did punish Rosenthal for the federal crime charged.

By refusing to recuse himself, Ahlgren comported himself in a way that showed he was biased. He was a witness before at least two agencies -- the OSC and the ARDC. He was a party under the Notice of Claim filed with SSA and GSA. He also functioned as prosecutor in gathering evidence to be used against Rosenthal. All of these activities which Ahlgren engaged in, information which he had access to as a witness, and sources of information which he gathered as prosecutor were all extrajudicial in nature. They were also outside his scope of judicial activity in deciding if Rosenthal had committed a federal crime. Therefore, under the extrajudicial source doctrine, Ahlgren did not have the legal capacity to decide Rosenthal's case. *Liteky v. United States*, 510 U.S. 540 (1994). He needed to recuse himself, in order to avoid, at the very least, the "appearance of impartiality." *United States v. Tucker*, 78 F.3d 1313, 1325 (8th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996).

Punishment for a federal crime, possession of a dangerous weapon, punishment for alleged insubordination, in refusing to hand over the dangerous weapon, and allegedly refusing to say who was on the telephone, while the seizure of the supposed dangerous weapon was in progress, all involve "dishonesty or immorality." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573

(1972). *Prior* to destroying Rosenthal's "good name, reputation, honor, or integrity," the defendants were obliged to provide him with "notice and an opportunity to be heard." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

Rosenthal was entitled to "some kind of prior hearing." *Roth*, at 570. Such a hearing had to comport with fundamental fairness. *See Roth* and *Constantineau*, *supra*. However, in this case, the oral union presentation before Ahlgren did not qualify as such a hearing. Ahlgren had the conflicts of interest discussed above. Any one of these conflicts required that he recuse himself which he failed to do. He failed to disclose the written statements of the other defendants until after punishment of Rosenthal and Ahlgren relied totally on the blade measurement statements of Barezky and Howard, without even attempting to produce the "dangerous weapon." The defendants have never alleged that the presentation before Ahlgren was a valid due process hearing.

Because of his punishment for a federal crime, Rosenthal will, for the rest of his life, have to declare his criminal record to every state and federal court, when he applies to practice law before that court. Boyer has also permanently barred Rosenthal from future possession of the Swiss Army "Super Tinker" pocketknife. Rosenthal will have to declare his criminal record on every job application and in any application for a security clearance. Is a carrier of dangerous weapons, who refuses to hand over the weapon at the time of seizure, who refuses to disclose who was on the telephone at the time of seizure, and who must be permanently barred from possession of the "dangerous weapon" a fit person to practice law, a fit person to employ in a law firm, or a fit person to entrust with the security of the United States? The question answers itself. This is the lifetime stigma which the defendants have guaranteed to Rosenthal. The defendants intentionally and systematically caused this permanent deprivation of liberty, in violation of the Due Process Clause of the Fifth Amendment.

In addition to the deprivation of liberty, as set forth above, the defendants also deprived Rosenthal of property, in violation of the Due Process Clause of the Fifth Amendment. After almost ten years on the job, he lost two weeks of salary as punishment for his "federal crime." He also had to buy a new pocketknife, because Bradley told him the government had permanently seized the "Super Tinker."

Rosenthal had a "legitimate claim of entitlement" to both his pocketknife and his salary. *Roth*, at 2709. This was not a case of an abstract need or desire for property. Barezky, Howard, Bradley, and all the other defendants combined to deprive Rosenthal of this property, through their above scheme which was intentional and which demonstrated reckless disregard of Rosenthal's Constitutional rights. This is conduct which shocks the conscience. The loss of the right to have a Swiss Army "Super Tinker" pocketknife, a legal item of personal property, is a permanent legal disability which is a loss of protected liberty. *Constantineau*, *supra*, at 25.

Rosenthal raised all of the above due process violations before the District Court and the Circuit Court. Neither the District Court, nor the Circuit Court, addressed the nature of criminal punishment and the lack of any valid due process hearing prior to punishment.

B. Both The District Court And Court Of Appeals Assumed Rosenthal Has Only An Administrative Remedy When None Exists And When The Only Remedy Is A Judicial One.

In addition to ignoring Rosenthal's right to a hearing before punishment for a federal crime, as discussed above, both the District Court and Court of Appeals based their decisions on the supposed right to a hearing after punishment. The Circuit Court stated that Rosenthal had only a personnel dispute and that the courts have "... no jurisdiction over federal civil service personnel disputes." App.5. Based on prior decisions of the Supreme Court, as well as prior Circuit Court decisions, the opposite is the case, as discussed below.

As noted above, the Supreme Court noted in *Bush* that a warrantless search and an uncompensated taking are not even "personnel actions within the statutory scheme" of the Civil Service Reform Act ("CSRA"). *Bush*, *supra*, at 17. A warrantless seizure of personal property, in violation of the Fourth Amendment, and common law conversion are both, by their very nature, a warrantless search and an uncompensated taking. A search occurs whenever an expectation of privacy that society is prepared to consider reasonable is infringed. *United States v. Jacobsen*, 466 U.S. 109 (1984). A seizure occurs whenever there is some meaningful interference with an individual's possessory interest in that property. *Jacobsen*, *supra*.

Rosenthal had a legal item of personal property, an ordinary pocketknife, on his keychain. Barezky told him to give it to Howard. Rosenthal took it off his keychain and complied. Bradley then seized the pocketknife the next day. Barezky, Howard, and Bradley then falsified the nature of the pocketknife, in order to justify the seizure they made. Barezky fabricated a scenario of Rosenthal being a potential murderer and had other employees do the same. Barezky, Bradley, Howard, and Ahlgren even saw to it that Rosenthal was punished for a federal crime.

These defendants violated Rosenthal's reasonable expectation of privacy and attempted to justify their actions by the criminalization of their victim. The standard for a search and seizure in the workplace is whether the employee has a reasonable expectation of privacy, given the context of the employee relationship. *O'Conner v. Ortega*, 480 U.S. 709 (1987). The conduct of the defendants is not only unreasonable. It is outrageous. As discussed above, such a warrantless search and seizure is entirely outside the "statutory scheme," as the Supreme Court made clear in *Bush*. Such conduct constitutes an uncompensated taking, also completely outside the statutory scheme. *Ingraham* and *Goss*, *supra* at 18.

In *Bush*, the Supreme Court also made clear that a suspension of 14 days or less is "not covered by this system" because there are "... no provisions for appeal for suspensions for 14 days or less." *Bush v. Lucas*, 462 U.S. 367, 385 n.28 (1983). Therefore, Rosenthal has no right to appeal to the MSPB, even if one views the conduct of the defendants as a "personnel action" which it clearly was not.

In order to support its conclusion that Rosenthal has only a personnel remedy through the MSPB, the circuit court cited *United States v. Fausto*, 484 U.S. 439 (1988). Fausto was initially dismissed from employment and subsequently suspended for 30 days for unauthorized use of a government vehicle. *Fausto*, at 440. He simply sought back pay under the Back Pay Act. *Id.*

Fausto was not charged with a federal crime and punished for that crime. It is irrelevant whether Fausto was in the excepted federal service or not. He never alleged a claim of Constitutional magnitude, as Rosenthal has. He was not a victim of police misconduct committed by those he called upon for help -- officers completely outside his agency. He was never the victim of a warrantless search

and seizure or uncompensated taking. Fausto never alleged a RICO conspiracy and had no evidence of such a claim.

Those outside Fausto's supervisory chain of command committed no tortious or criminal conduct toward him, in violation of the Constitution, RICO, and state law. Fausto made no allegation that the defendants in his case acted outside their official capacity. His case does not remotely resemble that of Rosenthal. As fully discussed above, the Supreme Court has made clear that such conduct which Rosenthal has alleged in detail is not barred by any administrative preemption or statutory scheme.

The Circuit Court also cited *Paige v. Cisneros*, 91 F.3d 40, 42 (7th Cir. 1996). Paige was discharged for insubordination only. *Paige*, at 41. In fact, the Circuit Court in *Paige* recognized: "... Paige lacks the sort of substantial constitutional claim that activates the rule requiring doubts to be resolved in favor of judicial review." The *Paige* court, therefore, also recognized that the lack of a Constitutional case did not require it to decide *if* Paige's claim was one in which:

> ... the CSRA does not affect the general grant of federal question jurisdiction in 28 U.S.C. § 1331 and waiver of sovereign immunity in 5 U.S.C. § 702 for cases seeking prospective relief. *Paige*, at 44.

Therefore, the Circuit Court in *Paige* recognized the problem which it did not have to address -- the same problem which the Circuit Court in this case elected to ignore. As in *Fausto*, the *Paige* case did not involve intentional and egregious Constitutional wrongdoing, criminal conduct in violation RICO, and intentional and egregious violations of state tort law. There were no allegations that the *Paige* defendants acted solely outside their official capacity. Therefore, the court in *Paige* did not have to address the split in authority which it recognized existed. *Id.*

Rosenthal's case states Constitutional claims which can only be "resolved in favor of judicial review." *Paige, supra.* This judicial review also needs to encompass the injunctive relief which only the judicial system can provide, especially since Rosenthal's case lies outside the "statutory scheme," as discussed above. This includes the clearing of his record, permitting him to carry a legal pocketknife,

and notification to suspects and defendants in other cases in which these FPS officers have been involved. The court is also needed, in order to have the dangerous weapon statute declared unconstitutional, because the definition of a "dangerous weapon" is fatally vague. Over the years, people have used any number of ordinary devices, instruments, materials, or substances to commit murder or serious bodily injury. This includes any knives at all, hat pins, scissors, hammers, screwdrivers, and countless other items. This statute only encourages the "arbitrary and discriminatory enforcement" which these defendants chose to visit on Rosenthal. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Use of such a vague statute offends the Due Process Clause.

The Circuit Court decided in another case that a federal inmate could bring a *Bivens* suit, because the administrative scheme to which he would otherwise be relegated did not contain adequate procedural safeguards which would protect his Constitutional rights and did not provide adequate deterrent value. *Bagola v. Kindt*, 131 F.3d 632 (7th Cir. 1997).

As in *Bagola*, Rosenthal cannot obtain any redress through the administrative scheme. He was punished for a federal crime, but the defendants were careful to suspend him for only 14 days. Therefore, as discussed above, he has no right to appeal to the MSPB. He has no redress for the search and seizure of his property or for its uncompensated taking, because those offenses are outside the CSRA. The defendants saw to it that he did not receive a fair hearing and he has no recourse to a hearing, because the statutory scheme provides none. Further, because the MSPB has no jurisdiction, there is no deterrent value for the defendants.

In this case, the Circuit Court stated *Bagola* does not apply, because of a "wholly different statutory scheme." App.5. As discussed in the preceding paragraph, this is a distinction without a difference. The problem for Bagola was that he could not establish facts which "rise to the level of constitutional significance." *Bagola*, at 647. Rosenthal has alleged and has already proven knowing and intentional violations of the Constitution which shock the conscience.

It is also important to note that only the judicial system can address the police misconduct of the employees of the GSA. The Circuit Court stated that the complaint sets forth only the failure to "properly investigate." App.3. The complaint alleges much more, in

regard to the GSA defendants. It alleges that these officers intentionally and knowingly made an illegal seizure, fabricated accounts of a dangerous weapon, and made false police reports to the U.S. Attorney and other agencies. None of this conduct is objectively reasonable and it establishes that the defendants used fabricated accounts to cover up an illegal seizure which they knew was not based on any articulable or reasonable need.

In *Soldal v. Cook County*, 506 U.S. 56 (1992), the Supreme Court held the conduct of officers violated the Fourth Amendment, under the standard of reasonableness, and that the police had furthered an enterprise, knowing that it was contrary to the law. *Soldal*, at 71-72. Rosenthal has no personnel relationship with the FPS. He called on these officers for help. Instead, they violated his Fourth and Fifth Amendment rights by making him more vulnerable to Constitutional deprivations by others and helped to create those deprivations themselves. *Gibson v. City of Chicago*, 910 F.2d 1510, 1521 n.19 (7th Cir. 1990). As with all these defendants, the FPS officers are entitled to no qualified immunity, because none of them did what "... a reasonable officer could have believed lawful." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in Martin Rosenthal v. United States of America. In the event that the Petition is granted, Petitioner prays that the judgment of the Court below be reversed and that the cause be remanded.

Respectfully submitted,

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